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Supreme Court, U.S.
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No. 95-089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LORRAINE BILLS,

Petitioner,

v.

SGT. DENNIS W. ASELTINE, OFFICER BRIAN P. DeNOYER, OFFICER RICK DAVIS, OFFICER JEFFREY K. EWALD, OFFICER DEBRA GAWRON, OFFICER MEDBURY and CHIEF LARRY OWEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DENNIS J. CLARK
Counsel of Record
PLUNKETT & COONEY, P.C.
243 West Congress, Suite 800
Detroit, Michigan 48226-3260
(313) 965-3900
Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3288

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QUESTIONS PRESENTED

1. Whether the decisions by the Sixth Circuit in *Bills I* and *Bills II* and by the Second Circuit in *Ayeni* are in conflict and therefore serve as a basis for further review by this Court?

2. Whether a private security officer's conduct in being present on the premises during a search by state law enforcement officers is subject to Fourth Amendment protection?

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Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Between May and August, 1987, Sergeant Dennis W. Aseltine of the Pinckney (Michigan) Police Department received information concerning alleged criminal conduct by Dennis Bills and Lorraine Bills at the General Motors Proving Grounds in Milford, Michigan. Aseltine had been informed that Charles Sutton, son of Lorraine Bills, had stolen radar detectors and given them to his mother and stepfather (Dennis Bills) who were selling them in the parking lot of the proving grounds. Sgt. Aseltine contacted William Meisling, a security officer at General Motors, and provided him with this investigative information. In turn, Meisling informed Aseltine that General Motors' security had been investigating Mr. Bills for allegedly stealing General Motors' property. Sgt. Aseltine had also received information that Mr. Bills was in possession of stolen General Motors property from discussions "on the street" in the Pinckney area.

On August 20, 1987, at approximately 5:40 p.m., Sgt. Aseltine received a telephone call from Chief Larry Owen of the Hamburg Township Police, who informed Aseltine that he (Owen) had been told that a stolen Kuobota generator was at the Bills' residence located at 5401 West M-36 in Pinckney, Michigan. At approximately 6:00 p.m. on August 20, 1987, Sgt. Aseltine personally met with Chief Owen and his informant, Mr. Art West, whose information was regarded as reliable. At the same time, Mr. West told Sgt. Aseltine that there was a large amount of new General Motors' property on the premises; he said that the Bills' home "looked like a General Motors warehouse."

Based on all of the information in his possession, Sgt. Aseltine contacted the Prosecutor and proceeded to obtain a search warrant for the Kuobota generator. He did not try to secure a warrant for the suspected stolen

General Motors' property, because he did not feel he had sufficient probable cause at the time.

Due to the ongoing investigation by the Village of Pinckney and General Motors in connection with the Bills family, Sgt. Aseltine contacted Meisling of General Motors to advise him of the situation and to invite him to accompany the police in the execution of the search warrant for the stolen generator. Meisling accepted the invitation and went with the police to identify anything visible that he felt was stolen General Motors' property; he considered his involvement to be proper.

Sgt. Aseltine and several other police officers went to the Bills' residence (a ranch home on a large lot in an agricultural/rural area) to execute the search warrant. Meisling arrived soon thereafter. As police approached the house, Charles Sutton, Lorraine Bills' son, came to the gate and opened it. Neither Lorraine Bills nor her husband, Dennis Bills, were home, but her two sons, Charles and Howard Sutton, were both inside the residence or on the premises.

The police entered the Bills' home for the purpose of the search and to secure the premises for the safety of both the occupants and those law enforcement officers involved in the search. Prior to this search, the Pinckney Police Department had received reports of automatic weapon fire coming from the Bills' property. Also, the police were aware that there were dogs (Dobermans and pit bulls) kept on the property.

Upon being shown the search warrant, Charles Sutton took Sgt. Aseltine to the location of the stolen Kuobota generator, i.e., through the garage and into the attached shed. Sutton admitted the generator was stolen. Soon after the discovery of the first stolen generator, a second generator was located in the same shed. A theft report

had been taken previously by the police with the information received matching this second generator. After obtaining telephonic authorization from the Livingston County Prosecutor, Police Officer Gawron prepared a second warrant. This second warrant was issued, and then executed within two hours after the first generator was found. The second warrant also authorized entry into the Bills' residence.

Between execution of the first and second warrants, the premises were secured while the search warrant application was prepared and the second search warrant was obtained from a magistrate.

While present at the scene, Meisling stayed with Sgt. Aseltine. After the discovery of the first generator, Sgt. Aseltine remained at the Bills' residence for approximately one hour to one hour and fifteen minutes to assist in security until the second warrant was executed. At one point, Sgt. Aseltine was called into the Bills' house and informed that there was a marijuana plant in the residence. The marijuana plant (which was visible through a window from outside the residence) was seized by the police as contraband in plain view in a room off the kitchen of the house.

The police went into the basement of the home for the purpose of securing the premises and to make certain there were no other persons present who could pose a threat to the police officers. They saw marijuana in plain view on a counter top. They also saw items of General Motors' property lining basement shelves, along with a quantity of guns including what appeared to be automatic rifles.

While the police were in Bills' home, they never opened any drawers. Nothing was opened, uncovered or moved by Meisling. Nothing was removed or seized from the premises other than the two stolen generators; no

General Motors' property was seized that evening. The police did take photographs of the marijuana plant and the guns.

Absent any direction from the police, Meisling took photographs of suspected stolen General Motors' property at various locations throughout the premises. Had Meisling not been there, Sgt. Aseltine would have photographed this property. Most if not all of the General Motors' property inside the house, garage and shed was in plain view. Based on the information known to him, Aseltine believed that this property had most likely been stolen from the General Motors Proving Ground.

On August 21, 1987, Meisling contacted the State Police and the Livingston County Assistant Prosecutor, and a warrant was obtained to search for and seize allegedly stolen General Motors' parts and equipment at the Bills' residence. The Prosecutor knew Meisling was going to accompany the State Police, but he did not indicate in any manner that it would be inappropriate. Aseltine had no involvement whatsoever in the search on August 21, 1987. Nor did he instruct Meisling to have any contact with the State Police regarding it.

Sgt. Aseltine testified that he was not aware of any state, federal or local law prohibiting a private person from being invited to accompany the police during execution of a search warrant. He had never been advised by a prosecutor or instructor that it would be unreasonable or unlawful. He believed that he acted reasonably, lawfully and in good faith when he invited Meisling to accompany him.

Dennis Payne, Ph.D., a former deputy commander of the Michigan State Police and current assistant professor at Michigan State University teaching police related subjects, was presented by the defense as an expert witness. Dr. Payne testified that there is no instruction

given at any Michigan police academy that police officers cannot invite private individuals to accompany them during execution of a search warrant. Nor is there any law in Michigan prohibiting such conduct. Dr. Payne opined that it was "very reasonable" for Sgt. Aseltine to have called Meisling and invited him along under the circumstances. Also, he opined that Sgt. Aseltine's conduct was "absolutely correct," lawful and not in violation of Bills' civil rights.

In *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) (Bills I), the circuit court found that the record supported the district court's interpretation that the police officers entered the Bills' residence on the authority of the search warrant before the generator had been located. 958 F.2d at 701-702. The circuit court also said that the police officers had the implicit authority under the search warrant to conduct a protective sweep of the premises and to seize the marijuana, which was contraband discovered in plain view. 958 F.2d at 705. The court also held that since the police officers were properly on the Bills' premises, they could photograph scenes presented in plain view, and the police photographs did not constitute a seizure, 958 F.2d at 707.

Concerning the issue of whether the scope of police authority under the warrant was exceeded by Meisling's presence and participation in the search, the court in *Bills I* concluded that this was a jury question and summary judgment should not have been granted. Summary judgment on the constitutionality (federal and state) of the search of August 20, 1987 was reversed because of the issue of material fact concerning the reasonableness of the police conduct in inviting a private citizen into the dwelling of another for purposes unrelated to executing the search warrant. The Court said:

> Thus, Meisling's inspection tour and photographing of items in plaintiff's home, by itself, while perhaps constituting a trespass, does not offend the Fourth Amendment. The critical question in this case is whether the police officers engaged in any constitutionally unreasonable act in permitting or facilitating Meisling's presence in plaintiff's home.

958 F.2d at 704. Later, the Court reiterated that ". . . the principal question in this case is whether the officers exceeded the scope of their authority under the warrant in inviting Meisling to conduct an inspection of a private dwelling they controlled." 958 F.2d at 705.

After remand, the police officers filed a motion for summary judgment on the grounds of qualified immunity. The motion was granted as to individual police officers Owen, DeNoyer, Ewald, Davis, Gawron and Medbury; it was denied as to Aseltine. The district court also dismissed the pendent state claims for alleged violation of the Michigan Constitution.

The case proceeded to a jury trial involving only Sgt. Aseltine on the single claim under 42 U.S.C. §1983. On November 5, 1992, at the conclusion of six days of trial, the jury made a specific finding that it was not unreasonable for Aseltine to invite Meisling to enter the Bills' home on August 20, 1987 during the execution of a search warrant. Since there was no violation of the Fourth Amendment right to be free from unreasonable searches, a Judgment of No Cause for Action was entered in favor of Aseltine and against Bills.

This judgment was affirmed by the Sixth Circuit in *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) (*Bills II*). After explaining that it had earlier remanded the case to resolve issues of material fact regarding whether Sgt. Aseltine had been "objectively reasonable" in inviting a

private security officer to accompany him on the search, the court held:

> A jury concluded that the officer had not acted unreasonably, and the district court dismissed Bill's state constitutional claims as a matter of law. Because we determine that there was no legal or trial error and hold that the jury's finding as to Sgt. Aseltine precludes liability for the other defendants, we affirm the judgment of the district court.

52 F.3d at 598.

SUMMARY OF ARGUMENT

In essence, Petitioner challenges the jury's verdict, but fails to identify any special or important reasons for granting certiorari; thus, her request should be denied (*see* Supreme Court Rule 10.1).

The decisions in *Bills I, Bills II* and *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), are not in conflict. In *Bills I*, the case was remanded for trial on the reasonableness of the police actions in permitting or facilitating Meisling's presence in Bills' home. In *Bills II*, following trial, the jury's conclusion that the police had not acted unreasonably was affirmed. In *Ayeni*, on interlocutory appeal, it was determined that defendant's motion to dismiss on qualified immunity grounds was properly denied because the complaint alleged violations of Fourth Amendment rights.

Furthermore, Meisling's conduct as a private citizen did not rise to the level of an agent for the state; thus, Fourth Amendment protections were not applicable.

REASONS FOR DENYING THE WRIT

I.

THE DECISIONS BY THE SIXTH CIRCUIT IN *BILLS I* AND *BILLS II* AND BY THE SECOND CIRCUIT IN *AYENI* ARE NOT IN CONFLICT AND DO NOT SERVE AS A BASIS FOR FURTHER REVIEW BY THIS COURT.

Petitioner asserts that the circuit courts in *Bills* and *Ayeni* have reached contradictory results. However, a close reading of these cases dispels Petitioner's assertion. In *Bills I*, since Petitioner was seeking money damages in a 42 U.S.C. §1983 action and not suppression of evidence in a criminal action, the issue was whether Sgt. Aseltine and his fellow police officers "committed acts that resulted in a constitutionally unreasonable intrusion into plaintiff's residence." 958 F.2d at 703. Meisling's inspection and photographing of items in Petitioner's home did not offend the Fourth Amendment, in part, because he was not acting under color of state authority, but rather, as a private citizen. The circuit court recognized that the manner in which a search warrant is executed presented a jury question in a §1983 action. Accordingly, the circuit court reversed the district court's summary judgment and remanded the matter for trial on the issue of the reasonableness of the police actions.

On remand, the jury concluded that Sgt. Aseltine did not act unreasonably in inviting Meisling to accompany him to Petitioner's home. On appeal to the Sixth Circuit, the court in *Bills II* affirmed the judgment in favor of Aseltine that he did not act unreasonably.

In *Ayeni*, Secret Service Agent Mottola invited a CBS camera crew to accompany him in the execution of a search warrant. The purpose of having the camera crew present "was to permit public broadcast of (Ayeni's)

private premises, and thus to magnify needlessly the impairment of their right of privacy." 35 F.3d at 686. It is axiomatic that the right to privacy is a critical protection afforded by the Fourth Amendment. Given the clear purpose of Mottola's actions in having a commercial television camera crew present during the search, it is not surprising that the Second Circuit would conclude that the complaint alleges Fourth Amendment violations resulting in Mottola being denied a defense of qualified immunity, which he had claimed in a pretrial motion to dismiss.

The most significant distinguishing feature between *Bills* and *Ayeni* is the fact that *Ayeni* involved an interlocutory appeal from a district court order denying a motion to dismiss on the ground of qualified immunity. The Second Circuit affirmed, finding that "[t]he complaint sufficiently alleges Fourth Amendment violations to withstand a motion to dismiss based on qualified immunity." 35 F.3d at 691. In *Bills*, the issue is not whether the complaint was sufficient. A jury trial has occurred with a finding in favor of Sgt. Aseltine. Specifically, the jury considered all the evidence and found that Sgt. Aseltine acted reasonably in permitting Meisling to accompany him into Petitioner's home for the purpose of obtaining photographs of allegedly stolen General Motors property.

The court in *Ayeni* itself recognized that it was not making a definitive and final legal ruling applicable in all situations. In footnote number 8, relied on by Petitioner, the court said that *Bills I* "lends support to the proposition that permitting the presence of a third party not assisting in a search *may* violate the Fourth Amendment" (emphasis added). 35 F.3d at 686 n. 8. As the court acknowledged, such a violation is uncertain; it does

not necessarily occur when a third party is present. In *Bills*, after a complete trial, the jury weighed the evidence and determined that there was no constitutional violation and that, in fact, Sgt. Aseltine had not acted unreasonably in permitting Meisling's presence.

In *Bills II*, the court discussed the *Ayeni* decision as follows:

> *Ayeni* may be distinguished by the court's failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms as a Fourth Amendment right to privacy:
>
> * * *
>
> It is hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard. As with the example of the Due Process Clause cited in *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, the fact that the Fourth Amendment embodies "well-established" principles will not defeat a claim of qualified immunity. Otherwise, the doctrine is rendered a mere rule of pleading.
>
> The Second Circuit cited *Bills I* for the proposition "that permitting the presence of a third party not assisting in a search *may* violate the Fourth Amendment." *Ayeni*, 35 F.3d at 686 n. 8 (emphasis added). The word "may" is of great significance; the Sixth Circuit has determined that the presence of a private citizen at the execution of a search warrant is not *per se* a constitutional violation.

52 F.3d at 602.

In *Harlow v. Fitzerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), this Court held that qualified immunity applies when a defendant's conduct

does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under this standard, Mottola had to know that permitting commercial television cameras to videotape the entire search would by its very nature violate Ayeni's right to privacy. Sgt. Aseltine, on the other hand, had no knowledge of any Fourth Amendment violation by permitting a private security officer to photograph allegedly stolen items while Aseltine was executing an otherwise constitutionally valid search warrant. In *Bills II*, the court acknowledged the lack of any definitive rule of law with respect to the role of private citizens in accompanying law enforcement agents in the execution of a search warrant, citing to *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980), *Ayeni* and *Bills I*. 52 F.3d at 603.

Thus, the holdings in *Bills I, Bills II* and *Ayeni* are not in conflict and do not form a basis for this Court to assume jurisdiction for review.

As to the police officers other than Sgt. Aseltine, none of their activities violated any "clearly established" federal or state law. No statutory or constitutional right was transgressed. Furthermore, there is no Michigan statute or case law which prohibits a private citizen from accompanying law enforcement officers who are conducting a search pursuant to a warrant.

Concerning federal law, 18 U.S.C. §3105 provides that other persons may accompany an officer executing a search if that person is aiding the officer. See *United States v. Clouston, supra; United States v. Schwimmer*, 692 F. Supp. 119 (E.D. N.Y. 1988). In the instant case, the Sixth Circuit noted that *Clouston* is distinguishable. 958 F.2d at 702. However, the point remains that there is no clearly established law, which should have been known by the police, prohibiting a private individual

from accompanying police officers in the execution of a search and seizure pursuant to a duly authorized warrant.

Police officers in the position of these Respondents could have reasonably believed that their conduct regarding Meisling did not violate law that was clearly established at the time. The issue does not involve a right that has been particularized or a right with clear contours. It can hardly be said that Meisling's presence was illegal in view of existent law. Likewise, it can not be said that any illegality was "apparent" to the police.

Nonetheless, the Sixth Circuit in *Bills II* held that the question of whether the other police officers were liable became moot when the jury decided that Sgt. Aseltine had not acted unreasonably when he invited Meisling to enter the Bills' residence. The court said:

> We hold that Aseltine's culpability is necessary to any liability of the other officers. Aseltine actively *performed* (invited Meisling to the search) what they merely failed to prevent, and he actually *knew* what they might only suspect. The officers' alleged violations were, in essence, "lesser included offenses" of Aseltine's, so that the jury's finding that Aseltine acted reasonably must mean that there can be no liability for failing to prevent "reasonable" actions. Thus, we find that Bills is collaterally estopped from going to a jury on the reasonableness of the attending officers' conduct. Since the officers did not act unreasonably, they are entitled to qualified immunity.

52 F.3d at 604; emphasis in original.

II.

A PRIVATE SECURITY OFFICER'S CONDUCT IN BEING PRESENT ON THE PREMISES DURING A SEARCH BY STATE LAW ENFORCEMENT OFFICERS IS NOT SUBJECT TO FOURTH AMENDMENT PROTECTION.

The remainder of Petitioner's argument is meritless, because it is based on the incorrect conclusion that Meisling's conduct may be considered state action for Fourth Amendment purposes.

A search by a private citizen, without more, is not subject to the restraints of the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

Furthermore, although *Soldal v. Cook County*, ___ U.S. ___, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), holds that actions of private citizens when supported by police activity are subject to Fourth Amendment protections, this legal principle is inapplicable under the facts of the instant case. In *Soldal*, the landlord had initiated eviction proceedings. He requested the sheriff's presence to prevent any interference by the tenants in their actual physical eviction. The deputy sheriffs knew there was no eviction order and that the landlord's actions were illegal, but they allowed the eviction to take place. Sgt. Aseltine's conduct is factually distinguishable from that of these deputy sheriffs. He had a valid search warrant and had no knowledge of any illegal conduct. He did nothing to support Meisling in the taking of photographs. Also, Petitioner was not home when Meisling was taking pictures, so there was no restraint of her from interfering with Meisling's activities.

The Sixth Circuit twice made findings that completely undermine Petitioner's argument. First, in *Bills I*, the court concluded that "Meisling was acting for his own

purposes rather than any purpose of the officers in the execution of their warrant." 958 F.2d at 702. Second, in *Bills II*, the court determined that "Meisling is not a state actor and thus cannot violate the Fourth Amendment." 52 F.3d at 606.

Since the facts dispel any argument that Meisling acted as a "instrument or agent" of the state, *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 109 S.Ct. 1402, 1411 (1989), Meisling's actions cannot implicate the protections of the Fourth Amendment. Therefore, no separate warrant was needed by Sgt. Aseltine for Meisling's activities. Additionally, if a warrant for Meisling's activities was unnecessary, Sgt. Aseltine cannot be deemed to have knowingly violated a clear constitutional right.

CONCLUSION

Petitioner has failed to set forth any important or compelling reasons as to why certiorari should be granted. The lower court has disposed of Petitioner's appeal in accordance with well established precedent. Therefore, this Petition for Certiorari should be denied.

Respectfully submitted,

DENNIS J. CLARK
PLUNKETT & COONEY, P.C.
243 West Congress, Suite 800
Detroit, Michigan 48226-3260
(313) 965-3900
Attorneys for Respondents.